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**VIETNAM CUSTOMS DRAFT REGULATIONS REVIEW AND
RECOMMENDATIONS; NEXT STEPS**

10 November 2014

This publication was produced for review by the United States Agency for International Development. It was prepared by Chemonics International Inc.

Program Name:	USAID Governance for Inclusive Growth Program
Contract Number:	AID-OAA-I-12-00035/AID-486-TO-14-00002
Contractor Name:	Chemonics International Inc.
COR Name:	Todd Hamner
Publication Date:	10 November 2014
Report Title:	Vietnam Customs Regulations Drafts Reviews
Author Name:	Nestor Scherbey
Expected Result:	Component Code: 1, KRA: 1.1

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EXECUTIVE SUMMARY

- A series of US AID GIG sponsored workshops were held with the General Department of Vietnam Customs (GDVC) in both Hanoi and Ho Chi Minh City in the period from October 20, 2014 through November 5, 2014, to review new draft customs regulations (called circulars) that are to be published on November 15, 2014 for implementation of Vietnam's new Customs Law on January 1, 2015. The workshops involved detailed presentations by GDVC officers of the changes in customs procedures and requirements made with the new regulations, followed by limited periods of questions and comments from the public.
- Six of eleven new regulations were deemed of priority importance and translated into English. These, together with a draft National Decree to implement the new Customs Law, were analyzed in detail and specific recommendations, suggested edits and comments were provided to the GIG team which, in turn, provided these to the GDVC Drafting Committee. In addition, comments, explanations and recommendations concerning compliance of the new draft regulations with WTO TFA and other trade agreements were provided during workshop sessions.
- A number of suggested revisions concerning implementation of international best customs practices were accepted or noted by GDVC, however, the process and approach of these public workshops that is explained more fully in this report did not lend itself to a systematic and focused effort to modernize and simplify Vietnamese customs procedures. As a result, recommendations made at the conclusion of this report suggest that new approaches are needed to achieve Vietnam Customs modernization and simplification, with a more robust program of trade and public participation, through a "Customs-Trade Partnership" program similar in approach to the Commercial Operations Advisory Committee in the United States that provides advisory support to U.S. CBP and trade partner agencies.
- It is recommended that the Government of Vietnam be urged and assisted with creation of a National Trade Facilitation Committee with a clear mandate for a coordinated effort focused upon an interagency process of administrative reform and modernization, which is not limited to the GDVC.
- It is recommended that the status of the Customs Mutual Administrative Assistance agreement (CMAA) between the United States and Vietnam be reviewed and, to the extent possible, consultation and actions are taken to expedite completion of this agreement. It will allow for provision of technical assistance by U.S. CBP to the GVDC that is very much needed

SECTION 1: REVIEW OF DRAFT CUSTOMS CIRCULARS

DRAFT CUSTOMS CIRCULAR ON PROCEDURES, SUPERVISION AND MANAGEMENT OF IMPORTS AND EXPORTS.

The Draft Circular (regulation) on Customs Procedures is the most extensive and comprehensive of the new draft Customs Circulars to take effect on January 1, 2015, to implement the new Customs Law and National Decree on the same date. It replaces nine previous Customs Circulars, including very recent primary customs regulations such as, for example, Circular 128/2013/TT-BTC with effect from November 1, 2013 and Circular 22/2014/TT-BTC with effect from April 1, 2014. The former consolidated and replaced previous regulations while the latter implemented the new e-Customs system implemented in Vietnam on April 1, 2014.

Specific Comments to draft Circular:

1. The draft regulation specifies in 151 pages detailed procedures for topics including customs declarations, transit procedures, duty and tax refund procedures, chapters on customs bonded warehouses, port inspections and many other topics. However, it omits important subjects such as Advance Customs Rulings. The conditions for these were specified in Circular 128 mentioned above and, contained problematic application conditions. The new draft National Decree on implementation of the Customs Law provides for these however, the actual conditions for application and issuance are left to the draft regulations to be issued by MOF and GVDC. These are absent from the current draft regulation and other draft customs regulations in progress.
2. The draft regulation mentions within its scope other important specialized subjects of customs regulation including customs valuation, HS tariff classification, export processing enterprises and zones and includes some language on each but, fails throughout to make reference to the specialized draft regulations being drafted on these specialized topics. As a result, confusion has been introduced as to which provisions actually govern these specialized subjects because language in this regulation has not been harmonized with that of the other specialized regulations being drafted.
3. Numerous detailed “Annexes” to this regulation are listed, specifying mandatory detailed requirements. Only two have been translated and, of these, “Annex I – Information Indicators Regarding Electronic Customs Procedures for Imports and Exports” is the most significant. It specifies in 77 pages, the information data elements required of importers and exporters for declarations in the new e-Customs systems implement on April 1, 2014. These contain redundant and extraordinarily confusing “codes”, as well as, complicated required calculations and many unnecessary information items that have and will continue to cause issues and possibly severe customs penalty exposure risks to companies and traders in Vietnam. The new “Annex” is unchanged from the problematic e-Customs declarations implemented on April 1 and, no effort to simplify and reform these requirements is evident.

4. Outdated, duplicative and administratively burdensome requirements continue to be required in the draft regulation. Examples include a requirement that “original copies” of electronically submitted documents must be provided that are “validated, signed and seals affixed, including the adjoining edges of multi-page documents.”
5. No criteria or provisions for acceptable electronic recordkeeping that is common with contemporary automated systems are provided, as an alternative to paper records.
6. With respect to Certificates of Origin necessary to obtain the benefits of trade agreements, no provision for acceptance of “self-certified” CO’s of the type that will be issued by producers and exporters under TPP has been made.
7. A provision requires accurate completion of a “Value Declaration Template” however, such a template (likely a form declaration questionnaire) is not provided.

DRAFT CUSTOMS CIRCULAR ON CLASSIFICATION

The draft customs regulation on classification of imported and exported goods deals specifically with customs tariff classification of imports and exports under the Harmonized Commodity Description and Coding System (HS) of the WCO, which serves as the basis for the customs tariffs of all WTO and WCO countries, including Vietnam. The accurate classification of goods determines the duties and taxes that shall be applied by customs and, it is an area of frequent disputes and controversies, despite the existence of highly technical and specialized rules and cases that serve as precedents in a number of countries.

International customs practices that have mitigated the frequency and severity of such disputes include resort to very detailed and objective rules published by the WCO that are treated as “authoritative guidance” to customs tariff classification and, by providing Advance Customs Rulings to importers on classifications to be applied to their goods.

This has been a difficult area for importers and exporters in Vietnam because, regardless of the efforts made by companies to accurately classify their imported or exported goods, their imports or exports have been subjected to a process of post-import clearance or export shipment in which Customs has “inspected” the goods after the fact and determined differing classifications, usually resulting in increased duties and taxes collected after the fact, including penalty interest and the prospect of administrative fines.

Specific Comments to Draft circular:

1. The draft regulation lacked an accurate reference to the basic rules of interpretation for tariff classification of imported or exported goods and this has been recommended by incorporating an explicit reference to the General Rules of Interpretation to the Harmonized Commodity Description and Coding System (HS) of the WCO.

2. While reference has been made in the draft regulation to the legal interpretations being the Section and Chapter Notes that appear throughout the tariff, a recommendation has been made to explicitly incorporate the Explanatory Notes to the HS of the WCO as an “authoritative guide” to application of the Section and Chapter Notes. This four-volume set of rules is issued by the WCO and updated on the basis of industry, technology and scientific criteria. It is treated by virtually all WTO customs services as authoritative. It is my understanding that it has not been fully translated into Vietnamese and, if it is completed and used by Vietnam Customs widely, this will have a positive effect in reducing the number of erroneous classifications and disputes that occur regularly.

3. The draft regulation provides for an elaborate regime of “inspection of goods” by local officers to determine their classification, including after-the-fact reclassification of goods. This continues reliance on past and current practices. Many of the issues involved with these practices could be resolved through implementation of an effective Advance Customs Rulings procedure to be made available to importers and exporters. However, the draft regulation puts this off to an unspecified future date by concluding that the GDVC “shall promulgate” a procedure for such rulings under this regulation.

4. The draft regulation provides for a “database” of rulings on customs classification to be created and maintained and implementation of this is in progress. However, a senior officer of GDVC from the Ho Chi Minh City Region pointed out that the database is not searchable as it displays only the number and date of ruling issuance, without providing further information as to contents and subject matter.

DRAFT CUSTOMS CIRCULAR ON CUSTOMS VALUATION

The draft customs regulation on customs valuation of imports and exports deals specifically with declaration and determinations of the dutiable or taxable values of imported or exported goods. This is a highly specialized area within customs practice and, is governed in all WTO countries by the Customs Valuation Agreement (CVA) contained in GATT 1994, which is formally known as the “Agreement On Implementation Of Article VII of GATT 1994.”

This specialized subject matter poses the highest of customs risk exposures for importers and exporters because, unlike an HS classification challenge that may involve applying a different duty rate to an importer’s goods, a revaluation challenge to all of an importer’s imports over a period of years can arise. Customs valuation cases can encompass relatively simpler commercial transactions between unrelated exporters and importers and, rise to very complex cases involving transfer pricing between related parties. Cases involving hundreds of millions of USD involving additional duties, taxes and very significant penalties have arisen over the past two decades. These have given rise to WCO issues and WTO requests for “consultations” in disputes where, a customs service misapplying customs valuation may be accused of misusing customs valuation practices as a non-tariff trade barrier.

Due to Vietnam's joining the WTO in 2007, there exists an admitted lack of capacity in this subject matter that takes a country's customs service many years to develop, due to the technical complexity and sophistication required in the subject matter.

Specific Comments to the Draft Circular:

1. The present draft regulation lacks specific terminology and references that implement the provisions of the CVA of GATT 1994. While listing the methods of customs valuation prescribed by the CVA, it fails to provide definitions and sufficient detailed information to guide GDVC's officers with accurate implementation of these methodologies.
2. The present draft regulation contains numerous provisions concerning "examinations" on the basis of official "reference prices" and other such references to practices for making customs valuation challenges. While there is an effort to frame these references within the terms of the CVA, these have been "localized" and contain erroneous interpretations that may well give rise to serious disputes in the future. The references and practices are contrary to the texts and spirit of the CVA of GATT 1994 and such cases are likely to rise to the level of intergovernmental disputes, as has occurred in Thailand over the last decade.
3. It is recommended that this draft regulation be carefully analyzed further in depth and extensively revised for compliance with GATT 1994, in its entirety.

DRAFT CUSTOMS CIRCULAR ON AUTHORIZED OPERATORS (CUSTOMS PRIVILEGED REGIME COMPANIES)

The draft customs regulation deals with conditions of designation, compliance and privileges afforded companies that achieve a status with customs authorities of being "trusted traders." These are typically (but not exclusively) companies that are large and have adequate resources to achieve a high level of customs compliance and supply chain security so as to engage in "informed compliance", "self audit" and possess internal controls so as to pose very low risks to customs and trade enforcement.

The development of trusted trader programs developed after initiation of the C-TPAT program in the United States, following the events of 9/11 and in response to the risks posed by global terrorism. Despite the security origins stimulating such programs, they have evolved globally to encompass multiple areas of customs and trade compliance and, enforcement based upon implementation of contemporary methodologies of risk management that have been embraced by the WCO. At present, there are only 24 companies in Vietnam that have attained this status, in contrast to over 10,700 in the U.S.

Specific Comments to the Draft Circular:

1. The draft regulation continues to reflect a condition in the draft National Decree for authorization of trusted trader “AEO” status in Vietnam that is problematic from the point of view of the WTO TFA and, supply chain security. This condition calls for minimum “turnover targets” of USD 100 million for importers and variously, USD 40 and 30 million in turnovers for exporters, depending upon industry. These turnover targets appear to conflict with provisions in the WTO TFA that provide that implementations of such programs shall not be made by WTO members in ways that discriminate between authorized operators on an arbitrary basis, nor should they be implemented in ways that discriminate against SME’s. Since the great majority of Vietnamese firms are SME’s, this condition works as an effective barrier to exclude the majority of these.
2. The secondary effect resulting from a combination of the definitions of firms entitled to apply for AEO status and the minimum turnover targets is to exclude important elements of global supply chain security in Vietnam. The leading logistics service providers, supplier firms to AEO’s, customs brokers and, warehousing and transportation companies in Vietnam that are all involved in the integrity of global supply chains for security purposes are excluded from participation.
3. It is recommended that the issues described above be addressed and resolved through amendment of the new Customs Law that provides for a “turnover target” (without specifying amounts) and revision of the National Decree and draft regulations. In lieu of such conditions, it is recommended that objective customs and trade compliance criteria, as well as supply chain security criteria be developed to allow for an integrated trusted trader program to be broadly implemented in Vietnam.

DRAFT CUSTOMS CIRCULARS ON EXPORT PROCESSING ENTERPRISES, EXPORT PROCESSING ZONES AND IMPORTS FOR PROCESSING

These draft regulations are considered together because they substantially overlap in terms of the subject matter regulated. One deals with companies operating in Export Processing Zones (EPZ’s) and, with companies not in such zones but designated as “Export Processing Enterprises (EPE’s).” The second regulation deals with companies performing similar commercial operations to that of EPE’s, based upon use of imported materials, products or supplies that are used to manufacture finished goods for export but, which are not EPE companies or located in EPZ’s. The majority of major EPE or EPZ companies in Vietnam are FDI companies or vendors to multinational firms.

Previous versions of these regulations have been especially problematic and involved large-scale noncompliance by both companies and local Sub-Department Customs officers who were aware that compliance by modern manufacturing enterprises with high-volume operations involving thousands of materials or products could not be achieved with the previous outdated administrative reporting and declaration requirements. In the first “e-Customs system” implemented in 2011, both companies and local officers discovered that no capability to update, adjust or otherwise modify

Bills of Material (BOM's called "norms" in the regulations), despite mandatory regulatory requirements that required this. These sets of regulations attempt to regulate procedures roughly comparable to those of U.S. Customs Duty Drawback and FTZ regulations contained in 19 CFR.

Specific Comments to Draft Circulars:

1. Both draft regulations continue previous outdated requirements for import, inventory and export manufacturing consumption reporting and customs declarations that are not compatible with modern information systems used by the majority of contemporary manufacturers known as "ERP's" or, Enterprise Resource Planning systems that consist of a suite of software programs for managing a company's key activities. In fact, changes made in the draft circulars to reporting requirements have actually increased the administrative burdens for companies, along with noncompliance risks.
2. Previous noncompliance with these impractical requirements was mitigated by local customs officers "looking the other way" when confronted with questions from companies for which they had no answers and, through local practices referred to as "relationships." However, recent changes in the laws concerning new and stiffened customs penalties and fines for noncompliance will now combine with a new regime of Post-Clearance customs audits based upon targeted "risk management." As a result, companies will find themselves exposed to greatly increased penalty risks for past noncompliance through new customs audits that are not under the control of their local officers.
3. In view of the situation described above, it is recommended that a new, detailed and fresh analysis be undertaken of these draft regulations in depth and that they be revised and modernized in their entirety, particularly with respect to reporting and declaration requirements. It is also recommended that an announced period of "restrained enforcement" by GVDC be implemented to allow companies to revise their reporting and customs declaration procedures in line with revised and modernized criteria, based upon new "informed compliance" procedures.

SECTION 2: CUSTOMS REGULATIONS MODERNIZATION PROCESS

WHY THE PRESENT PROCESS IS NOT EFFECTIVE AND RESULTS IN INCOMPLETE MODERNIZATION AND REGULATORY REFORM.

The frequency with which customs regulations in Vietnam are changed presents major issues of business operations predictability, as well as, continuing administrative burdens and risks to importers, exporters and other trade stakeholders. This is because of the haste with which such regulations are revised or drafted, in the absence of a systematic process of rulemaking that involves meaningful public comments that are focused on critical trade issues, within a framework of prior notice and opportunity to comment as will be required by the WTO TFA. The haste with which such changes are made prevents in-depth analysis and analytical focus upon the substantive subjects of regulation and their likely impacts, within a framework of national trade facilitation. As a result, previous outdated regulations are used by drafters at the GVDC as starting points and, contents that have not been previously modernized or simplified are largely continued in the new regulations but, with new gaps in coverage, while other changes are made at superficial levels to accommodate legal or trade agreement changes. This results in a condition in which such regulatory changes are never quite fully accomplished and, continuing efforts to modify and modernize these in the future will be necessary to achieve meaningful and substantive progress for Vietnam's ability to implement the provisions of the WTO TFA, as well as, anticipated TPP and other FTA agreements Vietnam is to be a party to.

While there was evident support for changes and a general willingness in workshops demonstrated by significant numbers of GDVC officers to be open to new ideas and inputs, there remain indications of some resistance from elements that may be a sign of inertia within a large organization or, may reflect the perceived self-interest of officers with a stake in the status quo. This is reflected in the approach to the workshops taken by GVDC. With one exception, these were mostly 3-4 hours of monologues by GDVC drafters who carry on in extraordinary detail about the minutiae of changes they have made to various Articles and provisions, regardless of significance to the public or to companies. They did not observe the timeframes allotted for their presentations and typically concluded very near or at lunchtime when, it was announced that Q & A, comments and recommendations will be allowed. This time period ranged from as little as 20 minutes, to a slightly longer period. However, it was not conducive to obtaining public input in a systematic and focused way. The approach was essentially one of "...we will publish regulations and guidelines and, inform you of what they are."

SECTION 3: VIETNAM CUSTOMS MODERNIZATION - RECOMMENDATIONS

If significant progress towards Vietnam's ability to make the reforms needed for implementation of the WTO TFA, prepare for TPP and for the other trade agreements Vietnam is or will be a party to is to be made, new approaches and significant technical assistance will have to be implemented and provided. The approaches and measures that follow are recommended for next steps.

- Review the status of the Customs Mutual Administrative Assistance agreement (CMAA) between the United States and Vietnam and, to the extent possible, expedite completion of this agreement. It will allow for provision of technical assistance by U.S. CBP to the GVDC that is very much needed.
- Facilitate the development and implementation of a “trade partnership” similar to that of Commercial Operations Advisory Committee (COAC) in the United States, to provide for a regular and ongoing public involvement in customs reform and simplification processes. In addition, the “trade partnership” will be needed to engage other Vietnamese ministries and agencies for trade facilitation of non-Customs trade regulations and administrative procedures. This will allow for professional and technical expertise from business and trade stakeholders to be provided to GDVC and other agencies involved to implement needed administrative reforms and such projects as the National Single Window, a huge effort that will require significant resources.
- Urge the Government of Vietnam to create a National Trade Facilitation Committee with a clear mandate for a coordinated effort focused upon an interagency process of administrative reform and modernization, which is not limited to the GDVC.
- Facilitate modernization and simplification projects developed by specialist resources that focuses on such priorities as:
 1. Training and capacity building for GDVC concerning customs valuation,
 2. Technical assistance with development of an online Customs Rulings system analogous to the CROSS system;
 3. Detailed review and simplification of the e-Customs system implemented by GDVC on April 1, 2014, particularly customs declaration requirements;
 4. Detailed reviews and simplification of the formats for declarations and procedures for monthly and quarterly reports currently required of EPE's, EPZ's and companies engaged in processing of imports for export production;
 5. Development of a National Single Window roadmap and plan for implementation.